SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 397

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, CHARLES L. DRESSEL, HARRY M. RESER, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION ON BEHALF OF APPELLEES, ASSOCIATED MILK DEALERS, INC., PAUL POTTER AND LELAND SPENCER.

FRED C. NONNAMAKER, JR.,
BEN H. MATTHEWS,
HARRY J. DUNBAUGH,
JAMES P. DILLIE,
Counsel for Appellees.

ISHAM, LINCOLN & BEALE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 397

UNITED STATES OF AMERICA

vs.

THE BORDEN COMPANY, ET AL.,

Defendants.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

STATEMENT OF GROUND MAKING AGAINST JURISDICTION.

Filed September 2, 1939.

Come now Associated Milk Dealers, Inc., Paul Potter and Leland Spencer, by their respective attorneys, and show the following grounds making against jurisdiction of the Supreme Court of the United States herein:

The United States seeks to appeal from an order sustaining demurrers of these defendants to the four counts of

the indictment filed herein. As to Count Three of said indictment, insofar as these defendants are concerned, the demurrers were sustained for the reason that said count was fatally defective for duplicity as well as failing to allege definitely a restraint of interstate commerce. It is apparent that the invalidity or construction of a statute certainly is not involved, so far as these defendants are concerned, in the decision on Count Three, and therefore the judgment as to Count Three, in respect to them, is not appealable. This is conceded in the Statement of Jurisdiction filed on behalf of the United States, wherein it is said:

> "The third count is here involved only insofar as demurrers interposed by the Pure Milk Association, its officers and agents, were sustained."

The demurrers of these defendants were sustained as to Counts One, Two and Four of the indictment, for the reason that no indictment will lie under the Act of July 2, 1890, 26 Sta. 209, Title 15 U. S. C. A. Sec. 1 (hereinafter referred to as the "Sherman Act") with respect to the production and marketing of agricultural products, including milk, for the reason that such products are removed from the purview of Section 1 of the Sherman Act by the Act of May 12, 1933, 48 Stat. 31, as amended August 24, 1935, 49 Stat. 750, and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, 30 Stat. 246, Title 7 U. S. C. A. Supp. IV, par. 601 *et seq.* (hereinafter referred to as the "Agricultural Marketing Acts").

The United States contends that the decision sustaining the demurrers to Counts One, Two and Four on the grounds stated is subject to review by direct appeal to the Supreme Court under Title 18 U. S. C. A. Sec. 682, Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended (hereinafter referred to as the "Criminal Appeals Act"); predicating its contention, first, upon the ground that the judgment is based

upon a construction of the statute upon which the indictment is founded, and second, upon the ground that the judgment is one sustaining a plea in bar. These defendants contend that jurisdiction of this court cannot be sustained on either ground.

The judgment sustaining demurrers did not involve a construction of Section 1 of the Sherman Act upon which the indictment is founded.

It is clear from the wording of the indictment that all of the counts here involved are founded upon Section 1 of the Sherman Act. Section 1 of the Sherman Act was not construed by the opinion or order of the District Court. Examination of said opinion and order discloses that every attack made by these defendants upon the counts here involved, other than that which the court sustained, was overruled. (See paragraph Fifth of the order of July 28, 1939.) From this it is apparent that apart from the effect given by the District Court to other statutes, that court held that Counts One, Two and Four of the indictment sufficiently stated offences under Section 1 of the Sherman Act.

The fact that the Court held that the acts charged in these counts of the indictment were within Section 1 of the Sherman Act distinguishes the present situation from that presented in the cases cited in the Statement of Jurisdiction filed on behalf of the United States, in particular the case of *United States* v. *Patten*, 226 U. S. 525. We are not contending that the acts charged would not, but for the Agricultural Marketing Acts, have brought the defendants within Section 1 of the Sherman Act. Our contention is that in spite of the fact that the acts charged would have brought the defendants under the Sherman Act prior to the enactment of the later laws, they are now no longer indictable under the Sherman Act because the new laws have

vested the Secretary of Agriculture w .h sole jurisdiction and have granted a new and exclusive method of prosecuting and punishing such acts.

Judgment sustaining the demurrers did not amount to a decision or judgment sustaining a special plea in bar.

It is the contention of the Government that the demurrers here dealt with constituted special pleas in bar. The defendants submit that this contention fails to take into consideration the fundamental difference between these two defences. A plea in bar always tenders an issue of fact. A demurrer always tenders an issue of law. It is true that the issue of fact tendered may be one of admitted fact, but whether admitted or contested, the facts thus pleaded are singled out of the opponents' pleading and set up as a bar. In the case of a general demurrer, facts pleaded by the opposition are conceded and the argument is presented that in law they constitute no cause of action. Several cases have been presented by the Government in which motions to quash, pleas in abatement, and even demurrers have been held to be in effect special pleas in bar, but an examination of all of these cases reveals that the pleading in question was in truth tendering an issue of fact and the ruling of the Court was merely to the effect that the appellation appended to the pleading was inconsequential in view of that fact. In one of the cases cited in the Statement of Jurisdiction submitted by the United States—that of *United States* v. *Goldman*, 277 U. S. 229—the Statute of Limitations was raised by a motion to dismiss the information. This was held tantamount to a special plea setting up at bar the admitted facts set forth in the information. The Court said (page 236):

> "Here the motion to dismiss raised the bar of the statute of limitations upon the facts appearing on the

face of the information, and was equivalent to a special plea in bar setting up such facts. And the effect of sustaining the motion was the same as if such a special plea in bar had been interposed and sustained."

In the case of *United States* v. *Thompson*, 251 U. S. 407, also cited by the Government, the distinction between pleas in bar and dilatory pleas is explained at length. It is the contention of the defendants that the application of these principles to the case at bar demonstrates that the defence presented by defendants' demurrers was not one in bar but rather one in abatement. As stated by Stephen on "Pleading," page 47:

> "A plea in bar is distinguished from all other pleas of dilatory class, as impugning the right of action altogether, instead of merely tending to divert the proceedings to another jurisdiction or suspend them or abate the particular writ or declaration. It is in short a substantial and conclusive answer to the action."

As said by this court in the *Thompson* case, the distinction between a plea in abatement and a plea in bar is that the former delays the suit, while the latter destroys the cause of action.

In the light of the ruling by the District Court, we do not contend here that prosecution of the acts charged is barred by reason of the Agricultural Marketing Acts; our contention is that by reason of said legislation the prosecution of the acts charged against the defendants by indictment is abated and relegated to the control and regulation of the Secretary of Agriculture under the new laws.

This latter contention is supported by the action of the Government taken within a short time after the judgment of the District Court was entered in this case, for it appears that the Secretary of Agriculture, pursuant to the authority vested in him by the Agricultural Marketing Act,

issued an order, with the approval of the President, regulating the marketing of milk in the area covered by the indictment herein. (See Vol. IV, Federal Register, No. 167, p. 3764, issued on August 30, 1939.)

Respectfully submitted,

(Signed) FRED C. NONNAMAKER, JR.,
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(Signed) HARRY J. DUNBAUGH,
(Signed) ISHAM, LINCOLN & BEALE,
(Signed) BEN H. MATTHEWS,
(Signed) JAMES P. DILLIE,
Attorneys for Leland Spencer.